

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SALVATORE SALERNO	:	DETERMINATION
	:	DTA NO. 819584
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes Under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1998	:	
through February 28, 2002.	:	

Petitioner, Salvatore Salerno, 102 Park Lane, Massapequa, New York 11758-4307, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1998 through February 28, 2002.

The Division of Taxation by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed December 4, 2003, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and (b). Petitioner, appearing *pro se*, had 30 days, or until January 4, 2004, to respond to the motion, and the 90-day period for issuance of this determination commenced on January 4, 2004. After due consideration of the documents and arguments presented, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of certain notices of determination.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Salvatore Salerno, one Estimated Notice of Determination and eleven notices of determination, each dated December 2, 2002, and each addressed to petitioner at “102 Park Lane, Massapequa, New York 11758-4307.” The notices each indicated that petitioner was being assessed as an officer or person responsible to collect and remit sales and use taxes on behalf of Sebastian Sales Corporation. The notices bore assessment identification numbers running consecutively from L-021839717 through L-021839728 and spanned the sales tax quarterly periods ended February 28, 1999 through February 28, 2002, with the exception of the sales tax quarterly period ended November 30, 2001. These notices assessed sales and use taxes due for such quarterly periods, as follows:

Notice Number	Sales Tax Quarterly Period	Tax Amount Assessed ¹
L-021839717	12/01/01 through 02/28/02	360.05
L-021839718	12/01/00 through 02/28/01	225.48
L-021839719	09/01/00 through 11/30/00	228.69
L-021839720	06/01/01 through 08/31/01	343.25
L-021839721	06/01/00 through 08/31/00	288.18
L-021839722	03/01/01 through 05/31/01	360.05
L-021389723	02/28/00 through 05/31/00	267.47
L-021389724	12/01/99 through 02/28/00	263.74
L-021389725	09/01/99 through 11/30/99	572.62
L-021389726	06/01/99 through 08/31/99	479.23
L-021389727	03/01/99 through 05/31/99	1,678.84
L-021389728	12/01/98 through 02/28/99	0.00
Total	-----	5,067.60

¹ The dollar amount of tax shown does not include penalty or interest, which was also assessed on each of the notices, nor are any credits or payments made subsequent to issuance of the notices reflected herein.

2. Petitioner filed a letter with the Division's Bureau of Conciliation and Mediation Services ("BCMS") challenging the foregoing notices and requesting a conciliation conference. The envelope in which this (undated) letter was mailed carried a United State Postal Service ("USPS") postmark dated May 13, 2003, and was stamped as received by BCMS on May 15, 2003. Petitioner subsequently also filed a Request for Conciliation Conference (Form CMS-1) with BCMS challenging the foregoing notices. This form is dated May 21, 2003, the envelope in which it was mailed carried a USPS postmark dated May 21, 2003, and was stamped as received by BCMS on May 23, 2003.

3. On June 13, 2003, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on December 2, 2002, but the request was not mailed until May 13, 2003, or in excess of 90 days, the request is late filed.

4. Notices of determination, such as the ones at issue herein, were computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also included the preparation of a certified mail record ("CMR"). The CMR listed those taxpayers to whom notices of determination were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other (fan-folded) before and after acceptance of the notices by the USPS through return of the CMR to the CARTS Control Unit.

5. Each computer-generated notice of determination was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the columnar heading "Certified No." The next columnar heading, entitled "Reference No.," lists the assessment number assigned to each notice listed on the CMR. The third columnar heading, entitled "Name of Addressee, Street and P.O. Address" lists the names

and addresses of the taxpayers to whom the notices are being issued. The remaining columns list the postage and fee amounts for the notices being mailed. The CMR also listed an initial date (the date of its printing) in its upper left hand corner, set forth in numbers listing the particular year, Julian day of the year and military time of day when such CMR was produced which, in this case, was “20023241700.” The date of printing listed on the CMR falls approximately 10 days earlier than the anticipated mailing date for the notices, with such period provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR in this case was manually changed at the time of mailing by Division personnel to December 2, 2002, in order to conform to the actual date of mailing.

6. The certified control number assigned to each notice, as appearing on the CMR, also appears on the front of a separate one page “Mailing Cover Sheet” (Form DTF-997) that is generated by CARTS for each notice. Each Mailing Cover Sheet also bears, on its front, a bar code, the taxpayer’s mailing address and a return address for the Division. The reverse side of each Mailing Cover Sheet carries taxpayer assistance information. CARTS also generates any enclosures referenced within the body of each notice. Ultimately, each notice, accompanied by its Mailing Cover Sheet and any appropriate enclosures, is a discrete unit with the batch of notices, with the mailing cover sheet being the first sheet in such unit.

7. After a notice of determination is placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staff member in the Mail Processing Center operates a machine which places each notice and the associated documents, as a unit, into a windowed envelope so that the addresses and certified number from the Mailing Cover Sheet show through the windows of the envelope. That staff member then weighs and seals each envelope and affixes “postage” and “fee” amounts thereon. A Mail Processing Center clerk then

checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and also performs a random review of 30 or fewer pieces of certified mail by checking the letters against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or initials, or both, to the CMR.

8. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control Unit.

9. In the instant case, the CMR was an 18-page, fan-folded (connected) computer-generated document entitled “Assessments Receivable Certified Record for Non-Presort Mail.” All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. This CMR listed 195 certified control numbers. Each such certified control number was assigned to an item of mail listed on the 18 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts. Each of the pages of the CMR contains eleven entries, with the exception of the last page (page “18”) which contains eight entries.

10. Information regarding the notices of determination issued to petitioner was contained on pages seven and eight of the CMR, which show the following corresponding certified mailing numbers and assessment numbers:

Certified (Mailing) Number	Reference (Assessment ID) Number
7104-1002-9739-0142-4468	L-021839717
7104-1002-9739-0142-4475	L-021839718

7104-1002-9739-0142-4482	L-021839719
7104-1002-9739-0142-4499	L-021839720
7104-1002-9739-0142-4505	L-021839721
7104-1002-9739-0142-4512	L-021839722
7104-1002-9739-0142-4529	L-021839723
7104-1002-9739-0142-4536	L-021839724
7104-1002-9739-0142-4543	L-021839725
7104-1002-9739-0142-4550	L-021839726
7104-1002-9739-0142-4567	L-021839727
7104-1002-9739-0142-4574	L-021839728

Petitioner's name, and the address "102 Park Lane, Massapequa, New York 11758-4307," appears on the CMR in the column immediately after each of the subject notices of determination.

11. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated December 2, 2002, and the initials "BK" representing the postal employee, verifying receipt of the items.

12. The last page of the CMR, page "18", contains a preprinted entry of "195" corresponding to the heading "Total Pieces and Amounts Listed." Appearing directly beneath this preprinted entry is the handwritten number "195," which is manually circled and is accompanied by the aforementioned postmark of the Colonie Center Branch of the USPS and the signature of "B. Kelly," the Postal Service employee accepting receipt of the items.

13. The affixation of the Postal Service postmarks, the initials and signature of the Postal Service employee, and the circling of the "195" indicate that all 195 pieces listed on the CMR were received at the post office.

14. In the ordinary course of business, the CMR is returned to the Division's CARTS unit, and the Division generally does not request, demand or retain return receipts from certified or registered mail.

15. The facts set forth above in Findings of Fact "4" through "14" were established through the affidavits of Geraldine Mahon and Bruce Peltier. Ms. Mahon was employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties included supervising the processing of notices of determination. Mr. Peltier was employed as a Mail and Supply Supervisor in the Division's Mail Processing Center. Mr. Peltier's duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

16. The address on the subject notices of determination, 102 Park Lane, Massapequa, New York 11758-4307, was the same as the address given on petitioner's New York State Personal Income Tax Return for the year 2001, which was filed with the Division on April 15, 2002. In addition, the same address was used by petitioner on all of the correspondence filed in connection with this matter, including his conciliation conference requests, his petition, and the letters sent in response to the instant motion.

17. Petitioner responded to this motion by letters dated December 24, 2003 and January 15, 2004. In each of these letters, petitioner challenges the substantive basis upon which the notices were issued arguing, in summary fashion, that he was not responsible for the business activities of Sebastian Sales Corporation. Petitioner did not offer any arguments or evidence to support a claim that he filed any protest against the notices at issue within the requisite period of time, i.e., 90 days after their issuance.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner offered no arguments or evidence to counter the Division's motion regarding the issue of the timeliness of petitioner's protest, and petitioner is therefore deemed to have conceded that no question of fact requiring a hearing on such issue exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227, 472 NYS2d 325, *appeal dismissed* 62 NY2d 942). Specifically, since petitioner presented no evidence to contest the facts alleged in the Mahon and Peltier affidavits, those facts may, as a consequence, be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 1138(a)(1) authorizes the Division to issue a Notice of Determination to a taxpayer where "a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient." This section further provides that such a notice "shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state." In this case, the record is clear that the address listed on the subject notices of determination was petitioner's last known address.

D. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the notice of determination (*see*, Tax Law § 1138[a][1]; § 170[3-a][a]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. (*See, Matter of Novar TV & Air Conditioner Sales and Service, Inc.*, Tax Appeals Tribunal, May 23, 1991 [where the Tax Appeals Tribunal stated that “where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination”].) Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination.

G. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the notices of determination in issue were mailed to petitioner on December 2, 2002. Specifically, this 18-page document listed certified control numbers and notice of determination numbers with corresponding names and addresses, including petitioner's certified control numbers, notice of determination numbers, name and address. All 18 pages of the CMR bore a USPS postmark dated December 2, 2002. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee signed page 18 of the CMR and circled "195" on that page to indicate receipt by the post office of all 195 pieces of mail listed thereon (*cf.*, *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is sufficient to establish that the Division mailed the subject notices of determination to petitioner on December 2, 2002.

H. Petitioner's request for conciliation conference was filed on May 13, 2003, a date which falls more than 90 days after the December 2, 2002 date of mailing of the instant notices of determination. The request was therefore untimely filed (*see*, Tax Law § 1138[a][1]; § 170[3-a][a]; 20 NYCRR 3000.3[c]).

I. The petition of Salvatore Salerno is hereby dismissed.

DATED: Troy, New York

February 19, 2004

/s/Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

